

Overcrowding in Prisons and Jails: Maryland Faces a Correctional Crisis

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Constitutional Law Commons](#)

Recommended Citation

Overcrowding in Prisons and Jails: Maryland Faces a Correctional Crisis, 36 Md. L. Rev. 182 (1976)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol36/iss1/9>

This Casenotes and Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

OVERCROWDING IN PRISONS AND JAILS: MARYLAND FACES A CORRECTIONAL CRISIS

Maryland's correctional facilities have in recent years become severely overcrowded. The problem, now experienced in many states, has reached crisis proportions and threatens serious disruption of the entire state criminal justice system. By relying upon incarceration in dealing with criminal offenders at a time when the state's facilities are incapable of adequately housing those who are sentenced to confinement, the state's criminal justice system is subjected to pressures which may subvert the efficiency of the entire law enforcement process. This comment will focus on the problem of overcrowding in Maryland's correctional facilities, its causes, constitutional implications, and remedies, in the hope that a concise statement of the problem may lend guidance to those whose duty it is to solve it.

In per capita incarceration rate of adult state prisoners (not including pretrial detainees), Maryland is said to rank second in the nation.¹ One apparent reason for a high number of incarcerated convicts is the current epidemic in crime,² but the high confinement rate may also be explained by other factors. Since 1968 Maryland and particularly the City of Baltimore have been receiving funds from the federal government under the "Safe Streets Act."³ This money has enabled the state's law enforcement agencies to modernize their equipment and training and thus to increase the general efficiency and professionalism of the police. While the crime rate has risen, so has the ability of the police to combat crime, resulting in higher arrest rates.⁴ Furthermore, over the past five

1. According to a study prepared by W. Donald Pointer, Deputy Secretary for Correctional Services of the Maryland Department of Public Safety and Correctional Services, Maryland has 132.9 adult prisoners incarcerated in state correctional institutions for every 100,000 people in the general population, ranking second behind Florida with 135.1. These figures are based on the 1970 census and a survey published by the United States Department of Justice Bureau of Prisons in 1972. Another study, prepared by the National Moratorium on Prison Construction and based on a wider variety of more current sources, lists Maryland as ranking seventh in the nation in overall incarceration rates. This calculation, unlike the Pointer study, includes all adult and juvenile prisoners incarcerated in local jails and correctional institutions. National Moratorium on Prison Construction (Washington, D.C.), *New Bed Space in Correctional Facilities, Cost, and Per Capita Detention Rates*, Aug. 2, 1975 (on file at the *Maryland Law Review*).

2. The incidence of violent crime in the United States rose forty-seven percent from 1969 to 1974. FBI, *UNIFORM CRIME REPORTS FOR THE UNITED STATES* 11 (1974).

3. 42 U.S.C. §§ 3701-95 (1970), *as amended*, (Supp. III, 1973). For analysis of the success of the funding mechanisms of these statutes, see Harman, *The Bloc Grant: Readings from a First Experiment*, 30 PUB. AD. REV. 141 (1970); Stanley, *How Safe the Streets, How Good the Grant*, 34 PUB. AD. REV. 380 (1974).

4. Interview with Richard W. Friedman, Director of the Mayor's Coordinating Council on Criminal Justice in Baltimore, Nov. 7, 1975 [hereinafter cited as Friedman interview].

The Baltimore City Police Department reports that for the first nine months of 1975 there was actually a 5.8 percent *decrease* in crime in Baltimore as compared

years the average length of sentence in Maryland has increased by 39.7 percent.⁵ This, coupled with a twenty percent increase over the last five years in the number of convicts sent to the Maryland prisons,⁶ has resulted in a constant increase in the number of people going into prison without a similar increase in those being released. This imbalance could be much worse, except that Maryland judges, aware of the severe overcrowding problem, are sentencing only thirteen percent of convicted defendants to incarceration in the Maryland Division of Correction.⁷ Another ten percent are sentenced to local jails and the remaining seventy-seven percent are given fines, probation, and suspended sentences.⁸

Maryland's Division of Correction has an effective bed capacity of about 6,764;⁹ the prison population as of December 1, 1975, was 7161.¹⁰ The problem is now serious, but the projections for the future are more alarming. From November 1, 1974, through December 1, 1975, the rise in population indicated a yearly increase rate of 685.¹¹ Even worse, for the last six months of 1975, this rate increased to 1,013 per year.¹² Construction as now planned, including a new Reception, Diagnostic, and Classification Center, a number of community corrections centers, and redesign of existing facilities, could bring the effective bed capacity up to about 8,500 by 1981.¹³ However, with an annual increase in prison population of 685, by that time the state's correctional system will be attempting to hold nearly 11,000 prisoners. By 1983, the shortage of beds could exceed 4,000.¹⁴

with the same period in 1974. Baltimore Police Dep't Newsletter, Oct. 29, 1975, at 3. Despite the apparent decrease in crime, arrests were up 11.2 percent. *Id.* The figures probably indicate increased police efficiency.

5. See A. WILNER, COMMUNITY CORRECTIONS LEGISLATION (S.B. 418, H.B. 1105) 8 (Legislative Report to the Maryland General Assembly, Feb. 9, 1976) [hereinafter cited as WILNER].

6. WILNER, *supra* note 5, at 7. The higher arrest rates have been a significant factor in bringing about the increase in convicts sentenced to incarceration. Friedman interview, *supra* note 4.

7. WILNER, *supra* note 5, at 8.

8. *Id.*

9. WILNER, *supra* note 5, at app. 5. Effective bed capacity is calculated by subtracting from the total number of beds those reserved for handling transients in transfer, housing during court trips, and "special confinement." In May of 1975, these totaled approximately 206. DEP'T OF PUBLIC SAFETY & CORRECTIONAL SERV., THE POPULATION PROBLEM IN CORRECTIONS AND APPROACHES TO SOLUTION 6 (1975).

10. WILNER, *supra* note 5, at 5.

11. *Id.*

12. *Id.*

13. DEP'T OF PUBLIC SAFETY & CORRECTIONAL SERV., THE POPULATION PROBLEM IN CORRECTIONS AND APPROACHES TO SOLUTION 2 (1975).

14. WILNER, *supra* note 5, at app. 5.

The crush expected to hit the prison system is already being experienced by the state's local jails.¹⁵ The Baltimore City Jail, for instance, has a comfortable capacity of between 1,150 and 1,200.¹⁶ The present population is approximately 1,900.¹⁷ Around eight hundred of these are inmates who have already been convicted, but because there are no available beds in the prison system the prisoners must remain at the city jail.¹⁸ The jail administrators are caught in a perplexing situation:

15. Generally the terms "prison" and "penitentiary" refer to post-conviction correctional institutions while a "jail" is taken primarily to mean a local pretrial detention facility, although most jails also hold some convicts whose sentences are relatively short.

16. Interview with Gordon Kamka, Warden of the Baltimore City Jail, in Baltimore, July 2, 1975. The jail has 971 cells. Each cell measures five feet by eight feet and is designed for single occupancy. In addition, there are two dormitories, each with a capacity of 150 inmates. These dormitories are filled; rows of double bunks are placed as closely together as possible to allow a minimum of space between them.

17. The Mayor's Coordinating Council on Criminal Justice runs a weekly check on the population of the Baltimore City Jail. Below are the results of the counts taken on March 22, 1976, and September 7, 1976:

JAIL POPULATION				
	Percentage of total population	Sept. 7	March 22	Change
1. Supreme Bench	24	464	520	-56
2. Federal	3	67	79	-12
3. District Court	21	414	292	+122
4. Immigration	1	5	26	-21
5. Sentenced	6	121	116	+5
6. Sub-curia	4	72	70	+2
7. Held for Division of Correction	41	793	526	+267
Total	100	1,936	1,629	+307
Hospital		-34	-21	-13
Escape		-9	-9	-
Actual Body Count		1,893	1,599	+294

Memoranda prepared by Richard W. Friedman, Director of the Mayor's Coordinating Council on Criminal Justice, March 22, 1976 and September 7, 1976.

18. The state pays the city on a per diem basis to compensate for the cost of holding convicted prisoners at the City Jail until their transfer to the State Division of Correction. In January of 1976, the bill had risen to \$600,000. O'Donnell, *The Law-and-Order Legacy Leaves Maryland in a Tight and Expensive Predicament*, The [Baltimore] Evening Sun, Jan. 19, 1976, § A, at 14, col. 1.

It should be noted that the jail is also forced to house a number of federal prisoners because of the lack of a federal detention facility in the Baltimore area. See note 17 *supra*. Other localities experiencing equally serious overcrowding in their jails are Prince George's County, Howard County, Montgomery County, and Baltimore County. Howard County's one-hundred year old jail is so overcrowded that some judges, it is reported, have simply refused to imprison many whom under normal circumstances they would incarcerate. The [Baltimore] Evening Sun, Apr. 26, 1976, § C, at 1, col. 7.

they cannot refuse to accept arrestees whom the police bring in, nor can they release those who are sentenced to the state Division of Correction.

The problem of overcrowding in correctional institutions is by no means peculiar to Maryland. The United States now has over a quarter of a million convicted prisoners behind bars — the highest figure in our history.¹⁹ Overcrowding has brought about tremendous pressures on correctional authorities in many states, particularly Arkansas,²⁰ Alabama,²¹ Louisiana,²² Mississippi,²³ and Florida,²⁴ parts of whose prison systems, due largely to overcrowding, have been declared in violation of the Constitution.

EFFECTS OF OVERCROWDING

To an administrator, an overcrowded prison or jail abounds in the many day-to-day practical problems of inadequate facilities and manpower. To a prisoner, however, overcrowding has a detrimental psychological and sociological impact which in turn aggravates the administrative problems. It is widely accepted that unless humans have a certain amount of physical space around their bodies, aggravation and stress result.²⁵ This territorial phenomenon is largely responsible for heightened tension in prisons.²⁶ After a tour of the overcrowded District of Columbia Jail, one expert stated:

Intrusion on personal space promotes aggression. So my conclusion concerning the condition of the D.C. Jail is that virtually every possible step to promote the aggressive potential in prisoners has been taken with utmost diligence.²⁷

Prisoners' accounts of the pervasive atmosphere of violence at various correctional institutions bear out the theories of the experts.²⁸ Courts

19. Law Enforcement Assist. Adm. Newsletter, No. 7, Feb. 1976, at 5.

20. See *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194 (8th Cir. 1974).

21. See *James v. Wallace*, 406 F. Supp. 318 (M.D. Ala. 1976).

22. See *Hamilton v. Schiro*, 338 F. Supp. 1016 (E.D. La. 1970), *order sub nom. Hamilton v. Landrieu*, 351 F. Supp. 549 (E.D. La. 1972).

23. See *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974).

24. See *Costello v. Wainwright*, 397 F. Supp. 20 (M.D. Fla. 1975), *aff'd*, 525 F.2d 1239 (5th Cir. 1976).

25. See Griffith & Veitch, *Hot and Crowded: Influences of Population Density and Temperature on Interpersonal Affective Behavior*, 17 J. PERSONALITY & SOC. PSYCH. 92 (1971); Calhoun, *Population Density and Social Pathology*, 1962 SCIENTIFIC AMERICAN 206. See also R. ARDREY, *THE TERRITORIAL IMPERATIVE* (1966), *THE SOCIAL CONTRACT* (1970).

26. See *Costello v. Wainwright*, 397 F. Supp. 20, 27 (M.D. Fla. 1975).

27. Affidavit of Robert Ardrey, *Campbell v. Magruder*, Civil No. 1462-71 (D.D.C., filed Mar. 21, 1975).

28. See, e.g., *McCray v. Sullivan*, 399 F. Supp. 271 (S.D. Ala. 1975).

have also been sensitive to the danger of epidemic created by overcrowding.²⁹ There is even evidence that oppressive conditions in pretrial detention facilities, such as those brought about by overcrowding, may ultimately prejudice a defendant at his trial.³⁰ Thus the studies and evidence conclude with virtual unanimity that overcrowding in prisons can be a serious health and safety problem, a conclusion raising many questions about the legality of overcrowded correctional facilities.

JUDICIAL INVOLVEMENT

Until recently the judiciary has avoided an active role in correctional administration. When called upon to order constructive changes or to redress prisoner grievances, the courts have generally followed a "hands-off" policy deferring all correctional matters either to the legislative or to the executive branches.³¹ This policy was justified on several grounds: 1) courts lack expertise in the field of penology;³² 2) judicial intervention might disrupt prison discipline;³³ 3) judicial involvement in correctional affairs might precipitate a flood of litigation;³⁴ 4) the doctrine of separation of powers precludes judicial involvement;³⁵ and 5) where federal

29. *E.g.*, *Costello v. Wainwright*, 397 F. Supp. 20, 27-28 (M.D. Fla. 1975).

30. *See Rankin, The Effect of Pretrial Detention*, 39 N.Y.U.L. REV. 641 (1964); *Wald, Pretrial Detention and Ultimate Freedom: A Statistical Survey, Foreword*, 39 N.Y.U.L. REV. 631 (1964).

The appearance and demeanor of a man who has spent days or weeks in jail reflects his recent idleness, isolation, and exposure to the jailhouse crowd. He is apt to be unshaven, unwashed, unkempt, and unhappy as he enters the courtroom under guard. . . . A judge's right to base findings of fact on witness demeanor is unchallenged: is he immune from the same reflex action in sentencing?

Id. at 632.

31. For discussion of the hands-off doctrine, see Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

32. *See Crothers v. Follette*, 314 F. Supp. 1014, 1023 (S.D.N.Y. 1970) (dictum). *See generally* Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 181-82 (1970).

33. *See, e.g.*, *Golub v. Krinsky*, 185 F. Supp. 783, 784 (S.D.N.Y. 1960). For analysis of the problems experienced in California prisons as a result of increased judicial involvement, see Comment, *Judicial Intervention in Corrections: The California Experience — An Empirical Study*, 20 U.C.L.A.L. REV. 452 (1973).

34. *See Barnett v. Rodgers*, 410 F.2d 995, 1004 (D.C. Cir. 1969) (Tamm, J., concurring). The fear appears to have been well-founded. With the demise of the hands-off doctrine, the number of prisoner complaints filed in federal courts has increased dramatically. In 1971, there were over 16,000 such actions, of which some 3,000 were civil rights complaints concerning prison conditions. FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT 12-13 (1972).

35. *See United States v. Marchese*, 341 F.2d 782, 789 (9th Cir. 1965) ("The federal prison system is operated in all its aspects by . . . the executive branch of the government, and not by the judiciary.") (citations omitted); *Powell v. Hunter*, 172 F.2d 330 (10th Cir. 1949); *Joyner v. McClellan*, 396 F. Supp. 912, 916 (D. Md. 1975).

courts deal with state prison matters, notions of federalism counsel restraint.³⁶

These traditional arguments have lost some of their persuasiveness in light of the growing recognition of individual rights.³⁷ In 1944, the Sixth Circuit took the first major step in limiting the hands-off doctrine holding: "A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."³⁸ Subsequent case law has modified and clarified this approach. The Supreme Court in *Procunier v. Martinez*,³⁹ although recognizing that many of the traditional justifications for a hands-off attitude have validity, concluded,

[A] policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.⁴⁰

36. See *Prieser v. Rodriguez*, 411 U.S. 475 (1973); *Shobe v. California*, 362 F.2d 545 (9th Cir.), cert. denied, 385 U.S. 887 (1966); *Hatfield v. Bailleaux*, 290 F.2d 632, 640 (9th Cir.), cert. denied, 368 U.S. 862 (1961).

37. See Millemann, *Protected Inmate Liberties: A Case for Judicial Responsibility*, 53 ORE. L. REV. 29, 38-45 (1973); Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

Some of the justifications for the hands-off doctrine have been refuted by the courts. It is often the cruel and arbitrary conduct of low-paid prison guards from which relief is sought. It is hardly sensible that judges defer to their expertise. See *Landman v. Peyton*, 370 F.2d 135 (4th Cir. 1966).

But, we cannot, without defaulting in our obligation, fail to emphasize the imperative duty resting upon higher officials to insure that lower echelon custodial personnel are not permitted to arrogate to themselves the functions of their superiors. Where the lack of effective supervisory procedures exposes men to the capricious imposition of added punishment, due process and Eighth Amendment questions inevitably arise.

Id. at 141.

In *Detainees of Brooklyn House of Detention for Men v. Malcolm*, 520 F.2d 392 (2d Cir. 1975), the court stated,

The failure in the past of legislators to take the proper correctional action to remedy these inhuman conditions for both detainees and convicted prisoners has eroded the historical reluctance of federal courts to interfere with the administration of penal institutions.

Id. at 397 (citations omitted). The Supreme Court held in *Monroe v. Pape*, 365 U.S. 167 (1961), that federalism does not preclude civil rights actions even when state remedies have not been exhausted. *But cf.* *Prieser v. Rodriguez*, 411 U.S. 475 (1973) (An inmate's sole federal relief from the *fact* or *duration* of his confinement is habeas corpus for which exhaustion of state remedies is a prerequisite).

38. *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944), cert. denied, 325 U.S. 887 (1945).

39. 416 U.S. 396 (1974).

40. *Id.* at 405-06. See also *Cruz v. Beto*, 405 U.S. 319, 321 (1972); *Haines v. Kerner*, 404 U.S. 519 (1972); *Johnson v. Avery*, 393 U.S. 483, 486 (1969).

In that case, the plaintiff inmates challenged the constitutionality of a prison regulation authorizing extensive mail censorship. The Supreme Court upheld the district court ruling, invalidating the regulation as a violation of the first amendment. However, later that year in *Pell v. Procunier*,⁴¹ the Court ruled that inmates' first amendment rights may be limited in light of the state's legitimate objectives of rehabilitation and maintenance of internal security. There, California prison inmates and members of the news media challenged a prison regulation prohibiting interviews between inmates and the press. The Court ruled that because alternative means of communication were available, the legitimate correctional interests were sufficient to justify deferring to the expertise of correctional officials and restricting the inmates' freedom to communicate. Thus *Pell* somewhat modifies the holding of *Procunier* and may signal a halt to the demise of the hands-off doctrine. Still, the Court held that a prisoner "retains those First Amendment rights that are *not inconsistent* with his status as a prisoner or with . . . legitimate penological objectives"⁴² and pointed out that no such legitimate interests were present in *Procunier*.⁴³ The current status of the hands-off doctrine would therefore not seem to preclude litigation concerning the constitutionality of prison conditions.⁴⁴

CONSTITUTIONALITY OF OVERCROWDING IN PRISONS: THE EIGHTH AMENDMENT

The constitutional guarantee against "cruel and unusual punishments"⁴⁵ has expanded in recent years to provide prisoners a basis for relief not only from specific acts of cruelty but from generally poor prison conditions as well. The provision finds its roots in the English Declaration of Rights of 1689.⁴⁶ Although there is persuasive historical evidence

41. 417 U.S. 817 (1974).

42. *Id.* at 822 (emphasis added).

43. *Id.* at 826.

44. Most of the prisoners' rights suits have been brought under 42 U.S.C. § 1983 (1970), as class actions under FED. R. CIV. PRO. 23(b)(3), with jurisdiction invoked under 28 U.S.C. §§ 1343(3) & 2201 (1970). For detailed analysis of the mechanics of prisoners' suits see Hirschkop, Crisman & Millemann, *Litigating an Affirmative Prisoners' Rights Action*, 11 AM. CRIM. L. REV. 39 (1972) and Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473 (1971).

45. U.S. CONST. amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

46. 1 W. & M., Sess. 2, c. 2 (1689); 1 KENT'S COMMENTARIES 606 (7th ed. 1851).

to the contrary,⁴⁷ the traditional view is that the intent was to prohibit only barbarous forms of punishment such as dismemberment and torture.⁴⁸ As society's predilection for these types of punishments waned, the eighth amendment was considered by some to be obsolete.⁴⁹ However, in 1910 the Supreme Court gave the provision renewed meaning, holding in *Weems v. United States*,⁵⁰ "[The eighth amendment] is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."⁵¹ Nearly half a century later the Court in *Trop v. Dulles*⁵² applied the eighth amendment to invalidate a punishment of loss of citizenship, (a punishment involving no form of physical brutality). In his plurality opinion, Chief Justice Warren stated, "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."⁵³

Having established that the basic concern of the eighth amendment is "nothing less than the dignity of man"⁵⁴ and that the eighth amendment applies to the states through the fourteenth amendment,⁵⁵ courts began to evaluate the constitutionality of prison conditions and to recognize that a claim of cruel and unusual punishment can be extended to prison practices and conditions as they pertain to a class of prisoner-plaintiffs.⁵⁶ In *Holt v. Sarver*,⁵⁷ in which the Arkansas Prison System was declared in violation of the eighth amendment, a federal court held that

unlike earlier cases . . . which have involved specific practices and abuses alleged to have been practiced upon Arkansas convicts, [this case] amounts to an attack on the System itself. As far as the Court is aware, this is the first time that convicts have attacked an entire penitentiary system in any court, either State or federal.⁵⁸

47. See Comment, *The Eighth Amendment, Beccaria and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 BUFF. U.L. REV. 783 (1975); Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

48. See *Hobbs v. State*, 133 Ind. 404, 409-10, 32 N.E. 1019, 1021 (1893). For discussion of the origins of the eighth amendment and its application see Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 636-39 (1966).

49. See *Hobbs v. State*, 133 Ind. 404, 410, 32 N.E. 1019, 1021 (1893) ("[T]he provision would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct.")

50. 217 U.S. 349 (1910). The defendant had been given fifteen years at hard labor for falsifying public documents.

51. *Id.* at 378.

52. 356 U.S. 86 (1958).

53. *Id.* at 101.

54. *Id.* at 100.

55. *Robinson v. California*, 370 U.S. 660 (1962).

56. See *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968).

57. 309 F. Supp. 362 (E.D. Ark. 1970).

58. *Id.* at 365.

Subsequent cases have affirmed this expanded interpretation of the eighth amendment.⁵⁹

Justice Brennan in his concurring opinion in *Furman v. Georgia*⁶⁰ isolates four tests by which the applicability of the eighth amendment proscription against cruel and unusual punishment can be determined:⁶¹ 1) is the punishment degrading to the dignity of man;⁶² 2) is the punishment severe and arbitrarily inflicted;⁶³ 3) is the punishment unacceptable to contemporary society;⁶⁴ and 4) is the punishment excessive, *i.e.*, is there a "significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted."⁶⁵ These tests provide a variety of approaches to assessing whether a prison system is unconstitutional. There is, however, an inescapable element of subjectivity in each of these tests, and what happens to be declared unconstitutional may well depend on the personal views of individual judges.⁶⁶

59. See, *e.g.*, *James v. Wallace*, 382 F. Supp. 1177 (M.D. Ala. 1974) (denial of defendants motion to dismiss), 406 F. Supp. 318 (M.D. Ala. 1976) (opinion and order).

It has been recognized that the concept of "cruel and unusual punishment" is not limited to instances in which a prisoner is subjected to individual punishment or abuse.

....

Where conditions within a prison are such that the inmates incarcerated therein will inevitably and necessarily become more sociopathic and less able to adapt to conventional society as the result of their incarceration than they were prior thereto, cruel and unusual punishment is inflicted.

382 F. Supp. at 1180-81. See also *Costello v. Wainwright*, 397 F. Supp. 20 (M.D. Fla. 1975), *aff'd*, 525 F.2d 1239 (5th Cir. 1976); *Gates v. Collier*, 501 F.2d 1291, 1300-01 (5th Cir. 1974); *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971), *enforced* 354 F. Supp. 1292 (E.D. Va. 1973).

60. 408 U.S. 238, 257 (1972).

61. In *Rudolph v. Alabama*, 375 U.S. 889, 889-91 (1963) (Goldberg, J., dissenting against the denial of certiorari), three such tests were identified: 1) does the punishment violate society's evolving standards of decency; 2) does the punishment fit the crime; and 3) can the permissible aims of punishment be as effectively achieved by a less severe alternative? In that case the petitioner was sentenced to death after a rape conviction.

62. 408 U.S. at 271. See *Trop v. Dulles*, 356 U.S. 86, 100 (1958); *Weems v. United States*, 217 U.S. 349, 366 (1910).

63. 408 U.S. at 274.

64. *Id.* at 277. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *Burns v. Swenson*, 430 F.2d 771, 778 (8th Cir. 1970).

65. 408 U.S. at 279. See *Weems v. United States*, 217 U.S. 349 (1910); *Ralph v. Warden*, 438 F.2d 786 (4th Cir. 1970); *Wright v. McMann*, 321 F. Supp. 127 (N.D.N.Y. 1970). In *Pell v. Procunier*, 417 U.S. 817, 822-23 (1974), the Supreme Court stated that the legitimate purposes of a corrections system are deterrence, isolation from society, rehabilitation, and discipline to maintain internal security.

66. In *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968), the court recognized that although the limits of cruel and unusual punishment are not easily defined and the standards are flexible, a determination of "the basic attitude of the entire [Supreme] Court to the Eighth Amendment" can be reached by interpretation of "the totality of the language used." *Id.* at 579. It would therefore appear that despite the academic desirability of making decisions based on neutral principles, see Wechsler, *Toward*

When applied to the problem of overcrowding, the eighth amendment proscription against cruel and unusual punishment must be analyzed in terms of the deprivations which are an inevitable result of overcrowding. While courts have not yet held that a mere showing of overcrowding is enough to establish cruel and unusual punishment, movement has been in that direction. Some have been quick to recognize the correlation between overcrowding and substantive deprivations.⁶⁷ Many of the incidents of overcrowding (*e.g.*, uncontrolled violence, health hazards, and inability of prison officials to provide adequate medical care) have in many cases not specifically dealing with overcrowding been held to be unconstitutional.⁶⁸

Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959), eighth amendment interpretation, especially when dealing with prison conditions, does not lend itself to detached analysis. It is perhaps for this reason that a number of courts when faced with an eighth amendment challenge to prison conditions have applied as many tests as will fit. In *Hamilton v. Schiro*, 338 F. Supp. 1016 (E.D. La. 1970), it was held: [C]onditions of plaintiffs' confinement in Orleans Parish Prison so *shock the conscience* as a matter of elemental decency and are *so much more cruel than is necessary to achieve a legitimate penal aim* that such confinement constitutes cruel and unusual punishment

Id. at 1019 (emphasis added). Likewise in *James v. Wallace*, 406 F. Supp. 318, 329 (M.D. Ala. 1976), it was found, "There can be no question that the present conditions of confinement in the Alabama penal system violate any current judicial definition of cruel and unusual punishment . . ." The court quoted from *Trop v. Dulles*, 316 U.S. 86, 101 (1958), to the effect that the eighth amendment "must draw its meaning from evolving standards of decency," and further stated, "The conditions in which Alabama prisoners must live . . . bear no reasonable relation to legitimate institutional goals." 406 F. Supp. at 328-29.

67. For example in *James v. Wallace*, 406 F. Supp. 318 (M.D. Ala. 1976), Judge Johnson noted that "overcrowding is primarily responsible for and exacerbates all the other ills of Alabama's penal system." *Id.* at 323. In *Costello v. Wainwright*, 397 F. Supp. 20, 31 (M.D. Fla. 1975), the court held:

In summary, the overwhelming evidence is that there is a direct and immediate correlation between severe overcrowding, as now exists in the Florida Prison System, and the deprivation of minimally adequate health care. In addition, it appears that severe overcrowding endangers the very lives of the inmates because of its being a factor in the causation of violence within the prison system.

68. The following is by no means a complete listing of prison litigation. It is merely intended to show a sampling of cases in which certain conditions (those usually present when there is overcrowding) have been held to be in violation of the Constitution.

Violence and physical assault by other inmates: *Woodhous v. Virginia*, 487 F.2d 889 (4th Cir. 1973); *Gates v. Collier*, 349 F. Supp. 881 (N.D. Miss. 1972); *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970) (*Holt II*); *Holt v. Sarver*, 300 F. Supp. 825 (E.D. Ark. 1969) (*Holt I*); *Commonwealth ex rel. Bryant v. Hendrick*, 444 Pa. 83, 280 A.2d 110 (1971); see *Belthea v. Crouse*, 417 F.2d 504 (10th Cir. 1969) (allegation by plaintiff inmates that they were beaten by other inmates and then denied proper medical treatment held to raise sufficient factual issue concerning eighth amendment violations to preclude summary judgment); cf. *Penn. v. Oliver*, 351 F. Supp. 1292 (E.D. Va. 1972) (isolated instance of inmate assault is not a violation of the eighth amendment unless the assault is shown to be part of a pattern of undisputed, unchecked violence or egregious failure to provide security). *But cf.*

PRETRIAL DETENTION

In evaluating the constitutionality of pretrial detention facilities, courts have had to rely on different constitutional reasoning.⁶⁹ Although one might think that the eighth amendment should apply with equal force to protect pretrial detainees from cruel and unusual punishment, many courts have ruled that the amendment has no applicability to jail conditions because pretrial detainees are not being punished, but merely detained.⁷⁰ The conditions of detention may well be cruel, unusual, and even

Kish v. County of Milwaukee, 441 F.2d 901 (7th Cir. 1971) (no cause of action against a sheriff of a local jail for sexual assaults by other inmates when it was shown that the sheriff had done all he could to prevent homosexual rape). See generally Plotkin, *Surviving Justice: Prisoners' Rights To Be Free from Physical Assault*, 23 CLEV. ST. L. REV. 387 (1974).

Inadequate medical care: Battle v. Anderson, 376 F. Supp. 402 (E.D. Okla. 1974) (level of medical care in prison inadequate to meet predictable health needs is a violation of the eighth amendment); Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972), *aff'd in part* 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975). See also Finney v. Arkansas Bd. of Correction, 505 F.2d 194 (8th Cir. 1974); Fitzke v. Shappell, 468 F.2d 1072 (6th Cir. 1972) (depriving badly needed medical care from a pretrial detainee is a violation of due process); McCollum v. Mayfield, 130 F. Supp. 112 (N.D. Cal. 1955).

In the following prison cases, overcrowding was seen as one of the prime factors responsible for substandard conditions and serious eighth amendment violations. Finney v. Arkansas Bd. of Correction, 505 F.2d 194 (5th Cir. 1974); James v. Wallace, 406 F. Supp. 318 (M.D. Ala. 1976); McCray v. Sullivan, 399 F. Supp. 271 (S.D. Ala. 1975); Costello v. Wainwright, 397 F. Supp. 20 (M.D. Fla. 1975), *aff'd*, 525 F.2d 1239 (5th Cir. 1976); Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); Hamilton v. Schiro, 338 F. Supp. 1016 (E.D. La. 1970), *order sub nom.* Hamilton v. Landrieu, 351 F. Supp. 549 (E.D. La. 1972).

69. For general discussion of the rights of pretrial detainees, see Comment, *Incarcerating the Innocent: Pretrial Detention in Our Nation's Jails*, 21 BUFF. U.L. REV. 891 (1972); Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L.J. 941 (1970); Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489 (1966).

70. *E.g.*, Johnson v. Glick, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973). "We have considerable doubt that the cruel and unusual punishment clause is properly applicable at all until after conviction and sentence." *Id.* at 1032. See Tyrrell v. Taylor, 394 F. Supp. 9, 18 (E.D. Pa. 1975); Rhem v. Malcolm, 371 F. Supp. 594, 624 n.5 (S.D.N.Y. 1974), *aff'd in part*, 507 F.2d 333 (2d Cir. 1974); Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 688 (D. Mass. 1973), *aff'd* 494 F.2d 1196 (1st Cir. 1974), *cert. denied*, 419 U.S. 977 (1974); Hamilton v. Love, 328 F. Supp. 1182, 1191 (E.D. Ark. 1971). But see Johnson v. Lark, 365 F. Supp. 289, 302 (E.D. Mo. 1973); Rhem v. Magrath, 326 F. Supp. 681 (S.D.N.Y. 1971). In Jones v. Wittenburg, 323 F. Supp. 93, 99-100 (N.D. Ohio 1971), *supplemental decision* 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972), the court stated that because the jail in question housed both convicts and pretrial detainees, it could see no reason why the eighth amendment protection afforded the convicts should not also apply to the detainees.

barbaric, but, because the state has not legitimately assumed its role as the instrument of society's punishment, the eighth amendment should not apply. Fortunately these courts have not felt constrained by this analysis. They have held that subjecting a pretrial detainee to overly oppressive conditions which are in effect punitive and thus treating him as though he were convicted is a violation of the fourteenth amendment, a deprivation of liberty without due process of law.⁷¹

Courts have recognized that a substantive due process constitutional evaluation of jails is akin to an eighth amendment analysis, or, as stated in *Rhem v. Malcolm*,⁷² "[A] detainee is entitled to protection from cruel and unusual punishment at least as a matter of due process if not under the Eighth Amendment." The legitimate state interests involved in incarcerating the accused are to insure his presence at trial and thereafter to maintain internal security.⁷³ If the restrictions placed upon him are harsher than necessary to further these interests, then, courts have held, there is a violation of due process.⁷⁴

71. See cases cited note 70 *supra*; *Inmates of Milwaukee County Jail v. Petersen*, 353 F. Supp. 1157 (E.D. Wis. 1973); *Smith v. Sampson*, 349 F. Supp. 268 (D.N.H. 1972); *Brenneman v. Madigan*, 343 F. Supp. 128 (N.D. Cal. 1972). These cases are based on a substantive due process rationale, a recognition of an individual's natural right to be free from arbitrary invasion by the state. The Supreme Court has lately relied on this concept in areas of personal liberties. See, e.g., *Roe v. Wade*, 410 U.S. 113, 167-71 (1973) (Stewart, J., concurring); *Griswold v. Connecticut*, 381 U.S. 479, 502-07 (1965) (White, J., concurring); see note 74 *infra*. For exhaustive analysis of the history of the due process clause and criticism of substantive due process, see Meyer, *Constitutionality of Pretrial Detention* (Part II), 60 GEO. L.J. 1382 (1972).

72. 371 F. Supp. 594, 623-24 (S.D.N.Y. 1974), *aff'd in part* 507 F.2d 333 (2d Cir. 1974).

73. See, e.g., *Anderson v. Nosser*, 438 F.2d 183 (5th Cir. 1971) ("[W]here incarceration is imposed prior to conviction, deterrence, punishment, and retribution are not legitimate functions of the incarcerating officials. Their role is but a temporary holding operation . . .") *Id.* at 190. See also *Tyrrell v. Taylor*, 394 F. Supp. 9, 19 (E.D. Pa. 1975); *Brenneman v. Madigan*, 343 F. Supp. 128, 138 (N.D. Cal. 1972). Implicit in the legitimate state interest in detaining for trial is the necessity to maintain security in the jail. See, e.g., *Detainees of Brooklyn House of Detention for Men v. Malcolm*, 520 F.2d 392, 397 (2d Cir. 1975); *Rhem v. Malcolm*, 371 F. Supp. 594, 623 (S.D.N.Y. 1974), *aff'd in part* 507 F.2d 333 (2d Cir. 1974). In addition, pretrial detention can be justified on public safety grounds in that some defendants are too dangerous to be freed before trial. For analysis of the constitutional issues raised by preventive detention, see Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489 (1966).

74. "[A]ny deprivation or restriction of the detainees' rights beyond those which are necessary for confinement alone, must be justified by a compelling necessity." *Detainees of Brooklyn House of Detention for Men v. Malcolm*, 520 F.2d 392, 397 (2d Cir. 1975). See *Butler v. Crumlish*, 229 F. Supp. 565, 567 (E.D. Pa. 1964).

In other areas of personal liberties, courts have held that certain forms of governmental regulation are unconstitutional if the legitimate end sought to be achieved can be effected by a less restrictive alternative. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 498 (Warren, C.J., Goldberg & Brennan, JJ., concurring) (state interest in safeguarding marital fidelity can be achieved by a less intrusive

Some courts have analyzed conditions of pretrial detention by means of various interpretations of equal protection. One theory is that if conditions of confinement are more restrictive than necessary to insure appearance at trial and to maintain jail security (the same criteria used in a due process evaluation of jails) then the pretrial detainees, by comparison to arrestees out on bail, are said to suffer an impermissible discrimination.⁷⁵ The argument as stated in *Brenneman v. Madigan*,⁷⁶ is: "Except for the right to come and go as he pleases, a pre-trial detainee retains all of the rights of a bailee, and his rights may not be ignored because it is expedient or economical to do so." The problem with this approach is that it rests on the assumption that because both detainees and bailees are presumed innocent they are entitled to equal treatment.⁷⁷ However, in actuality they cannot be considered equal: one class is incarcerated, the other is free. In effect the courts are saying that both groups should be treated as equally as possible, considering the constraints which must be placed on the detainees. This reasoning distorts the concept of equality.⁷⁸

An equal protection question can also be raised by comparing treatments accorded detainees and convicts. It can be said that confinement for detainees under conditions as restrictive as those for convicts amounts

means than a statute outlawing the use of all contraceptive drugs and devices); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (desire to protect national security can be achieved by less restrictive legislation than that which makes it a crime for a member of a communist organization to apply for or use a passport); *Shelton v. Tucker*, 364 U.S. 479 (1960) (statute requiring state teachers to file an affidavit listing all organizations to which they have belonged or contributed is too broad to be justified by the state's legitimate interest in assuring the competence of its teachers). See also *NAACP v. Button*, 371 U.S. 415 (1963); *Lovell v. Griffin*, 303 U.S. 444 (1938); *Covington v. Harris*, 419 F.2d 617, 623-25 (D.C. Cir. 1969); *Palmigiano v. Trivisono*, 317 F. Supp. 776, 788 (D.R.I. 1970).

75. See *Rhem v. Malcolm*, 527 F.2d 1041, 1043-44 (2d Cir. 1975). This analysis can be used to attack the constitutionality of bail itself in that only those who cannot afford to pay a bailbondsman are detained and hence suffer an invidious discrimination. See Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 1125 (1965).

76. 343 F. Supp. 128, 138 (N.D. Cal. 1972).

77. See *Rhem v. Malcolm*, 527 F.2d 1041, 1044 (2d Cir. 1975) ("Presumed innocent in the eyes of the law, [detainees] are incarcerated solely to insure their appearance at subsequent proceedings").

The "presumption of innocence" is merely a shorthand expression for the proposition that the government has the burden of proof on the issue of guilt in criminal cases. The "presumption" cannot be used as a constitutional foundation for pretrial detainees' rights. See *Blunt v. United States*, 322 A.2d 579 (D.C. App. 1974); Meyer, *Constitutionality of Pretrial Detention* (Part II), 60 GEO. L.J. 1381, 1438-39 (1972).

78. See *Tyrrell v. Taylor*, 394 F. Supp. 9, 19 n.30 (E.D. Pa. 1975). Note that although there are weaknesses in this equal protection argument, if the facts of any particular case established that pretrial detainees have suffered restrictions greater than necessary to further legitimate state interests, then there may well be violations of due process. See text accompanying notes 71-75 *supra*.

to an unreasonable classification or, as stated in *Hamilton v. Love*,⁷⁹ "It is clear that the conditions for pre-trial detention must not only be equal to, but superior to, those permitted for prisoners serving sentences for crimes they have committed against society."⁸⁰ The crux of this reasoning is that it can be a violation of equal protection to treat different classes similarly. Stated in slightly different terms, inclusion of pretrial detainees in the same class with prisoners requiring highly restrictive confinement is unconstitutionally overinclusive; it subjects pretrial detainees to conditions which the state could justify imposing only upon convicted prisoners.⁸¹

Some courts have modified this approach and found an equal protection violation by considering as one class all those incarcerated (detainees and convicts) and concluding that if the conditions for pretrial detainees are worse than those in local prisons, then the detainees have been denied equal protection.⁸² This approach can be criticized in that it logically precludes holding that conditions for pretrial detainees should be better than those for convicts; being in the same class, they would have to be treated equally.⁸³ Furthermore, there are situations in which it is unavoidable that some convicts receive better treatment than pretrial detainees, *e.g.*, convicts on work release programs. To maintain that equal protection requires equality of treatment for all those confined is a gross oversimplification. This equal protection argument has a certain appeal when limited to comparing deplorable jail conditions with those in prisons, but, carried to its logical extreme — equality in all respects — its basic fallacy becomes apparent.

79. 328 F. Supp. 1182 (E.D. Ark. 1971), *supplemental order* 358 F. Supp. 338 (E.D. Ark. 1973).

80. 328 F. Supp. at 1191. See *Rhem v. Malcolm*, 371 F. Supp. 594, 625 (S.D.N.Y. 1974); *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676, 688 (D. Mass. 1973); *Smith v. Sampson*, 349 F. Supp. 268, 272 (D.N.H. 1972); Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L.J. 941, 947-50 (1970).

81. For discussion of overinclusion, see *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065, 1086-87 (1969).

82. See *Miller v. Carson*, 392 F. Supp. 515, 521 (M.D. Fla. 1975):

[A]t least 90% of the [jail] inmates . . . never leave their exceedingly cramped ten man cells, not even to eat meals.

. . . .

An additional consideration is the fact that the city defendants, by their own testimony, provide extensive outdoor recreation at the Jacksonville Correctional Institution, which houses sentenced prisoners. This creates a patent equal protection violation since one class of inmates incarcerated by the city defendants is clearly being treated much more harshly than another class.

In *Sinclair v. Henderson*, 331 F. Supp. 1123 (E.D. La. 1971), the court held it to be cruel and unusual punishment to confine prisoners on death row for long periods of time without outdoor exercise.

83. See *Tyrrell v. Taylor*, 394 F. Supp. 9, 19 n.30 (E.D. Pa. 1975).

The problem was recognized by the court in *Inmates of Suffolk County Jail v. Eisenstadt*,⁸⁴ where it was stated,

[S]uch an analysis can be carried too far. It does not mean that new correctional and penal institutions may not be constructed or old ones renovated because they might thereby become less confining and punitive than certain decrepit detention centers within the same system. It does mean, however, that prisoners awaiting trial . . . may not constitutionally be made the orphans of criminal jurisprudence whose degradation may be ignored because they are merely charged with criminal offenses rather than found guilty of them.

The lack of consistency in the application of an equal protection evaluation of jails adds to the confusion. For instance the court in *Rhem v. Malcolm*⁸⁵ held, "the equal protection clause mandates treatment of New York City detainees at least as favorable as that accorded New York State prisoners, *unless a rational basis for the different treatment is provided.*" Yet in the same opinion it was flatly stated that "a detainee may not be confined under conditions more rigorous than a convicted prisoner"⁸⁶ In *Brenneman v. Madigan*,⁸⁷ the court concluded that

subjecting pre-trial detainees to restrictions and privations other than those which inhere in their confinement itself or which are *justified by compelling necessities* of jail administration, is a violation of the due process and equal protection clauses of the Fourteenth Amendment.

The cases are thus unclear as to whether treating detainees more harshly than convicts is completely prohibited, or, if sometimes acceptable, whether by rational or compelling justification. This lack of uniformity suggests that the courts' reasoning is motivated primarily by notions of fundamental fairness (*i.e.*, substantive due process) and that the rather unclear equal protection rationale is used merely to bolster their conclusions.

The legality of overcrowded jails has also been challenged as a breach of local, rather than constitutional, law. In *Wayne County Jail Inmates v. Wayne County Board of Commissioners*⁸⁸ a Michigan court found that the overcrowded conditions in the county jail constituted a violation of Michigan Housing Law and Michigan Corrections Department Regulations. The court said that the jail should have provided at least five hundred cubic feet of air space and at least 52 square feet of floor space

84. 360 F. Supp. 676, 688 (D. Mass. 1973).

85. 371 F. Supp. 594, 625 (S.D.N.Y. 1974) (emphasis added).

86. *Id.* at 623.

87. 343 F. Supp. 128, 142 (N.D. Cal. 1972) (emphasis added).

88. 1 Pris. L. Rptr. 51 (Cir. Ct. of Wayne Co., Mich. 1971), *supplemented order*, 1 Pris. L. Rptr. 186 (Cir. Ct. of Wayne Co., Mich. 1972), *aff'd and remanded* 391 Mich. 359, 216 N.W.2d 910 (1974). For a full discussion of this case, see Note, *Criminal Procedure — Pretrial Detainment — The Jailer's Duty to Provide Jail Inmates "Reasonable Protection" and Facilities Conforming to State and Local Housing Codes*, 18 WAYNE L. REV. 1601 (1972).

for each inmate. The jail was also in violation of the Detroit Building Code with respect to plumbing, ventilation, heating, electrical, fire, and sanitation requirements. In *Smith v. Hongisto*⁸⁹ the Federal District Court for the Northern District of California used the minimum jail standards set by California law as criteria to establish constitutional violations in the conditions of pretrial detention in the San Francisco County Jails.⁹⁰ It was likewise held in *Taylor v. Sterrett*⁹¹ that the Texas state jail standards provided a sufficient objective basis for assessing the quality of the jail facilities.

REMEDIES

In most of the jail⁹² and prison⁹³ cases discussed above, overcrowding has been recognized as a prime factor bringing about unconstitutional deprivations. At what point the density of any prison population becomes unconstitutional will depend, of course, on many factual issues. In some cases, the conditions arising from housing two men in cells designed for single occupancy have been held unconstitutional.⁹⁴ In other

89. 2 Pris. L. Rptr. 284 (N.D. Cal. 1973).

90. "Due Process requires only that lawful punishment be imposed, and when persons are incarcerated under conditions violative of the laws of the state, the punishment exceeds that authorized by law." *Id.* at 288.

91. 344 F. Supp. 411 (N.D. Tex. 1972), *modified* 499 F.2d 367 (5th Cir. 1974), *cert. denied*, 420 U.S. 983 (1975). In that case the court, relying exclusively upon state law, granted the relief requested but declined to make any constitutional evaluations. However, in dictum the court did say that the jail in question "would" constitute cruel and unusual punishment. 344 F. Supp. at 420.

92. The following cases have dealt with overcrowding as one of many issues raised in challenging the conditions of pretrial detention: *Rhem v. Malcolm*, 527 F.2d 1041 (2d Cir. 1975), *aff'g* 389 F. Supp. 964 (S.D.N.Y. 1975), *on remand from* 507 F.2d 333 (2d Cir. 1974), *aff'g in part*, 371 F. Supp. 594 (S.D.N.Y. 1974), *supplemental order* 377 F. Supp. 995 (S.D.N.Y. 1974); *Detainees of Brooklyn House of Detention for Men v. Malcolm*, 520 F.2d 392 (2d Cir. 1975); *Valvano v. Malcolm*, 18 Crim. L. Rptr. 2394 (E.D.N.Y. 1975); *Alberti v. Sheriff of Harris County*, 406 F. Supp. 649 (S.D. Tex. 1975); *Tyler v. Percich*, Civil No. 74-40-C (E.D. Mo., filed Oct. 16, 1974); *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676 (D. Mass. 1973), *aff'd* 494 F.2d 1196 (1st Cir.), *cert. denied*, 419 U.S. 977 (1974), *district court order re-affirmed* 518 F.2d 1241 (1st Cir. 1975); *Johnson v. Lark*, 365 F. Supp. 289 (E.D. Mo. 1973); *Hamilton v. Love*, 328 F. Supp. 1182 (E.D. Ark. 1973), *order* 358 F. Supp. 338 (E.D. Ark. 1973); *Holland v. Danelon*, 2 Pris. L. Rptr. 375 (E.D. La. 1973); *Obadele v. McAdory*, 2 Pris. L. Rptr. 413 (S.D. Miss. 1973); *Smith v. Hongisto*, 2 Pris. L. Rptr. 257 (N.D. Cal. 1973); *Taylor v. Sterrett*, 344 F. Supp. 411 (N.D. Tex. 1972), *modified* 499 F.2d 367 (5th Cir. 1974), *cert. denied*, 420 U.S. 983 (1975); *Jones v. Wittenberg*, 323 F. Supp. 93 (N.D. Ohio 1971), *order* 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom.* *Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972); *Wayne County Jail Inmates v. Wayne County Bd. of Comm'rs*, 391 Mich. 359, 216 N.W.2d 910 (1974); *Commonwealth ex rel. Bryant v. Hendrick*, 444 Pa. 83, 280 A.2d 110 (1971).

93. See cases cited at note 68 *supra*.

94. See, e.g., *Detainees of Brooklyn House of Detention for Men v. Malcolm*, 520 F.2d 392, 398-99 (2d Cir. 1975); *Inmates of Suffolk County Jail v. Eisenstadt*, 360

instances the constitutional evaluation of overcrowding has been made with reference to the overall "design," "normal," or "rated" capacity of the particular institution.⁹⁵ The courts have not been quick to make constitutional evaluations based solely on numbers. It is only when overcrowding is the cause of deplorable or inhumane conditions or serious deprivations that overcrowding becomes unconstitutional. Nonetheless, having recognized the causal connection between overcrowding and unconstitutional prison and jail conditions, courts find difficulty fashioning a workable remedy. The problem is made more difficult in situations in which the authorities have limited means at their disposal with which to control institutional population. In the case of the Baltimore City Jail the overcrowding is caused by the large number of arrestees who cannot make bail and by the back-up of convicted prisoners for whom no room in the state's correctional facilities can be found.⁹⁶ City and jail officials, having little control over these factors, are limited in their capability to take corrective action.⁹⁷ Despite the understandable practical difficulties, judges have steadfastly held that lack of resources provides no excuse for allowing constitutional violations to continue.⁹⁸ An impasse results.

Rather than press for immediate solutions some courts have adopted a remedial abstention approach: the court makes its findings, suggests remedies, and, at least as a matter of first instance, leaves the implementation up to the legislature.⁹⁹ For instance in *Holt v. Sarver*¹⁰⁰ a

F. Supp. 676 (D. Mass. 1973), *aff'd* 494 F.2d 1196 (1st Cir.), *cert. denied*, 419 U.S. 977 (1974).

95. See, e.g., *James v. Wallace*, 406 F. Supp. 318, 332 (M.D. Ala. 1976); *Costello v. Wainwright*, 397 F. Supp. 20, 38-39 (M.D. Fla. 1975), *aff'd* 525 F.2d 1239 (5th Cir. 1976).

96. See text accompanying notes 15-18 *supra*.

97. For discussion of Baltimore City's efforts in this area, see text accompanying notes 125 & 131 *infra*. In some states, government officials have had to resort to extraordinary means to accommodate the excess of prisoners. In Florida the Department of Correction put up tents on an athletic field adjacent to one of its prisons. *Costello v. Wainwright*, 397 F. Supp. 20, 36 (M.D. Fla. 1975). Maryland Governor Marvin Mandel, looking for ways quickly to increase the state's prison capacity, recently toured an unused Navy troop carrier ship and declared that it would make an ideal prison. If all goes as planned, the federal government will make the ship available and it will be converted to a floating prison within a year. The [Baltimore] Sun, May 21, 1976, § C, at 1, col. 4.

98. See *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969); *Watson v. Memphis*, 373 U.S. 526, 537 (1963); *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676, 687 (D. Mass. 1973); *Johnson v. Lark*, 365 F. Supp. 289, 302 (E.D. Mo. 1973); *Taylor v. Sterrett*, 344 F. Supp. 411, 422 (N.D. Tex. 1972); *Collins v. Schoonfield*, 344 F. Supp. 257, 264 (D. Md. 1972); *Brenneman v. Madigan*, 343 F. Supp. 128, 139 (N.D. Cal. 1972); *Hamilton v. Love*, 328 F. Supp. 1182, 1194 (E.D. Ark. 1971).

99. For an interesting comparison of the remedial abstention approaches taken in remedying prison conditions and in effecting school desegregation, see Comment, *Equitable Remedies Available to a Federal Court After Declaring an Entire Prison System Violates the Eighth Amendment*, 1 CAPITAL U.L. REV. 101 (1972).

100. 300 F. Supp. 825 (E.D. Ark. 1969) (*Holt I*).

federal court found extensive eighth amendment violations due in particular to inadequate internal security and grossly overcrowded isolation cells throughout parts of the Arkansas Prison System, but, declining to shape any specific remedy, ordered prison officials to propose remedial action.¹⁰¹ Insufficient change came as a result of that order, and one year later the case was again before the district court.¹⁰² There the court, although finding constitutional violations, emphasized the impossibility of quick solutions and gave the state further opportunity to produce a plan for remedying the situation.¹⁰³ The court of appeals affirmed and remanded for further hearing on the showing of progress.¹⁰⁴

The hearings continued in *Holt v. Hutto*,¹⁰⁵ and the matter once again reached the court of appeals in *Finney v. Arkansas Board of Correction*.¹⁰⁶ Although steps had been taken by constructing new barracks, by this time serious overcrowding was a major problem. The circuit court observed, "Moreover, relief [new construction] will apparently be short-lived, for the testimony reveals that inmate population increases each year."¹⁰⁷ Hence, after over five years of litigation, the Arkansas Prison system remained still burdened with unconstitutional overcrowding.

Many courts, particularly in the jail cases, have been far more direct in the remedies ordered. In *Jones v. Wittenberg*,¹⁰⁸ the court ordered that the Lucas County [Ohio] Commissioners appropriate money to set up a bail release program designed to screen arrestees and release on bail those who present little risk of failing to appear at trial.¹⁰⁹ In *Valvano v. Malcolm*¹¹⁰ the court specifically ordered immediate release of detainees starting with those who had spent the longest time in jail with the lowest bail until the overcrowding be alleviated. In other cases relief has been granted in the form of ordering reduction to single-cell

101. *Id.* at 833-34.

102. *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970) (*Holt II*).

103. *Id.* at 383.

104. *Holt v. Sarver*, 442 F.2d 304 (8th Cir. 1971).

105. 363 F. Supp. 194 (E.D. Ark. 1973).

106. 505 F.2d 194 (8th Cir. 1974).

107. *Id.* at 201.

108. 323 F. Supp. 93 (N.D. Ohio 1971), *order* 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom.* *Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972).

109. 330 F. Supp. at 714. *See also* *Alberti v. Sheriff of Harris County*, 406 F. Supp. 649 (S.D. Tex. 1975). For discussion of bail reform projects, see notes 129-38 and accompanying text *infra*.

110. 18 Crim. L. Rptr. 2394 (E.D.N.Y. 1975).

occupancy,¹¹¹ double-cell occupancy,¹¹² transfer to other institutions,¹¹³ and general improvement of facilities.¹¹⁴

In litigation concerning the unconstitutional overcrowding in Florida's correctional system¹¹⁵ a federal court set a time table for the reduction of population. The court did not find it necessary to order the institution of the specific means by which the decree was to be carried out. It merely noted that by increased use of parole, good time credits for early release, pretrial intervention, and leasing of additional facilities, compliance with the order would be feasible.¹¹⁶

Recently in Alabama, Federal Judge Frank M. Johnson made it clear that continued unconstitutional overcrowding would not be tolerated.¹¹⁷ An injunction was issued preventing the state from accepting any new prisoners (except escapees and parole violators) into the penal system until the population at several of the state's main correctional facilities be reduced to design capacity.¹¹⁸ Judge Johnson's opinion ended on this rather stern note:

Let the defendant state officials now be placed on notice that failure to comply with the minimum standards set forth in the order of this Court . . . will necessitate the closing of those several prison facilities herein found to be unfit for human confinement.¹¹⁹

111. See *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676 (D. Mass. 1973), *aff'd* 494 F.2d 1196 (1st Cir.), *cert. denied*, 419 U.S. 977 (1974). Later in *Eisenstadt*, the First Circuit re-affirmed the district court's ancillary order that the defendants continue running a bail project even after federal funding for the project had been cut off. 518 F.2d 1241 (1st Cir. 1975). See also *Detainees of Brooklyn House of Detention for Men v. Malcolm*, 520 F.2d 392, 398-99 (2d Cir. 1975).

112. See *Johnson v. Lark*, 365 F. Supp. 289, 304 (E.D. Mo. 1974).

113. *Commonwealth ex rel. Bryant v. Hendrick*, 444 Pa. 83, 280 A.2d 110 (1971).

114. See *Taylor v. Sterrett*, 344 F. Supp. 411 (N.D. Tex. 1972), *modified*, 499 F.2d 367 (5th Cir. 1974), *cert. denied*, 420 U.S. 983 (1975). See cases cited note 92 *supra*.

115. *Costello v. Wainwright*, 397 F. Supp. 20 (M.D. Fla. 1975), *aff'd with slight modification* 525 F.2d 1239 (5th Cir. 1976).

116. 397 F. Supp. at 35. Cf. *Gates v. Collier*, 349 F. Supp. 881, 903-04 (N.D. Miss. 1972), *aff'd* 501 F.2d 1291 (5th Cir. 1974) (district court suggests that studies to reduce population at the Mississippi State Penitentiary should focus on transfer of prisoners, use of half-way houses, work release, parole, probation, and new construction).

117. *James v. Wallace*, 406 F. Supp. 318 (M.D. Ala. 1976).

118. The injunction had been in effect for over four months prior to the handing down of the opinion and order. In August 1975, Judge Johnson, together with Judge William Brevard Hand of the Southern District of Alabama, granted the plaintiffs' prayer for emergency interim relief. *McCray v. Sullivan*, Civil No. 5620-69-H (M.D. & S.D. Ala., filed Aug. 29, 1975). The order, besides dealing with overcrowding, mandated improving conditions of the segregation cells; the setting up of a classification system which would be aimed, among other objectives, at identifying those inmates who would best benefit from alternatives to incarceration; and improving general conditions in health, internal security, mail censorship, and physical facilities.

119. 406 F. Supp. at 331.

The Alabama approach provides an object lesson as to the ultimate practicability of such drastic judicial relief: the problem is not solved, it is merely shifted. The immediate result of the injunction in Alabama has been a back-up and serious overcrowding in the state's local jails.¹²⁰ If such relief were granted in Maryland to solve the overcrowding in the state's post-trial correctional facilities, the problems now experienced by the Baltimore City Jail and all local jails would be intolerably compounded.

The solutions are obvious: either build more institutions or find alternatives to incarceration. However, the first solution is fraught with economic and political obstacles; the second is bound to meet with heavy public opposition, especially in light of the fact that in Maryland already only twenty-three percent of all convicted persons are sentenced to incarceration.¹²¹ Despite the unpopular elements inherent in both alternatives, choices must be made, if not by the legislature, then inevitably by the courts.

Pretrial Alternatives

At the pretrial stage incarceration can be avoided in two different ways: pretrial release and, more radically, complete diversion from the criminal justice system.¹²² The basic goals of a pretrial diversion program are to ease the burden on overcrowded jails and court dockets and to provide a more effective and cheaper means of rehabilitation.¹²³ After

120. Interview with Matthew L. Meyers of the National Prison Project [Amicus Curiae in *James v. Wallace*, 406 F. Supp. 318 (M.D. Ala. 1976)] in Washington, D.C., Jan. 15, 1976. For discussion of many of the problems that have arisen due to increased judicial involvement in correctional affairs, see Sullivan & Tift, *Court Intervention in Correction: Roots of Resistance and Problems of Compliance*, 21 CRIME & DELIN. 213 (1975); Rubin, *The Impact of Court Decisions on the Correctional Process*, 20 CRIME & DELIN. 129 (1974); Comment, *Judicial Intervention in Corrections: The California Experience — An Empirical Study*, 20 U.C.L.A.L. REV. 452 (1973).

121. WILNER, *supra* note 5, at 8, app. 10a-b; see text accompanying notes 7-8 *supra*.

122. Rate of incarceration can also be reduced by decriminalization of "victimless" crimes, e.g., prostitution and possession of certain drugs. There are some offenses, such as non-payment of alimony, for which punishment by incarceration, although providing some degree of deterrence, seems counter-productive. Giving a man ninety days in jail for non-support may cause him to lose his job and render support payments even less likely to be forthcoming. As noted above, see text accompanying notes 7-8 *supra*, Maryland judges are resorting to confinement in only twenty-three percent of convictions. Thus, from a sentencing point of view, there has been some de facto decriminalization. Nonetheless, by legislative decriminalization of certain offenses, the burden on court dockets can be lightened resulting in speedier trials and consequently shorter periods of pretrial detainment.

123. For a thorough analysis of pretrial diversion see J. MULLEN, THE DILEMMA OF DIVERSION: RESOURCE MATERIALS ON ADULT PRE-TRIAL INTERVENTION PROGRAMS (LEAA); R. NIMMER, DIVERSION: THE SEARCH FOR ALTERNATIVE FORMS OF PROSECUTION (1974); NATIONAL PRETRIAL INTERVENTION SERVICE CENTER, PRETRIAL INTERVENTION STRATEGIES: AN EVALUATION OF POLICY-RELATED RESEARCH AND POLICYMAKER PERCEPTIONS (R. Rovner-Piecznik, ed. 1974) [hereinafter cited as PRETRIAL INTERVENTION STRATEGIES]; NATIONAL PRETRIAL INTERVENTION SERVICE

arrest, candidates are screened by staff members who make a determination based on the candidate's age, sex, employment, residence, previous record, and the crime charged.¹²⁴ If the judge and prosecutor agree, a speedy trial is waived and a continuance is granted while the candidate is placed in a program of social services whereby he may receive counseling, job training, remedial education or other assistance aimed at improving his ability to function in society and reducing his likelihood of becoming a chronic recidivist. Contingent upon his successful completion of the program, all charges are dropped. In the event that the candidate does not complete the program, he stands trial.¹²⁵

Despite the meritorious aims of pretrial diversion (especially that of preventing a young first offender from having a criminal record), the concept is not without its critics. There is some question whether the defendant should plead guilty in order to be eligible for the program. If such a guilty plea were required, doubt would be cast on the voluntariness of the plea when the defendant's alternative is trial and possible conviction.¹²⁶ There have also been arguments that pretrial diversion is less expensive than incarceration, but recent evaluations have shown this claim to be unsubstantiated.¹²⁷ Many good-risk first offenders who

CENTER, SOURCE BOOK IN PRETRIAL INTERVENTION TECHNIQUES AND ACTION PROGRAMS (1974) [hereinafter cited as SOURCEBOOK]; VERA INSTITUTE OF JUSTICE, PROGRAMS IN CRIMINAL JUSTICE REFORM (1972); Comment, *Pretrial Diversion from the Criminal Process*, 83 YALE L.J. 827 (1974) [hereinafter cited as Comment, *Pretrial Diversion*].

124. The principal criteria may differ depending upon the program. For a description of the various types of programs, see SOURCEBOOK, *supra* note 123, at 16-55.

125. Baltimore now has one pretrial diversion project, the Pretrial Intervention Program, which provides counseling and remedial education services for juveniles aged 15-17. Project FOUND, a program which offered similar services for the 18-26 age group, was discontinued in mid-1976 due to lack of local funding. The [Baltimore] Sun, Apr. 24, 1976, § B, at 1, col. 4.

126. See Comment, *Pretrial Diversion*, *supra* note 123, at 833-34; SOURCEBOOK, *supra* note 123, at 96-97. This fear is well expressed in N. MORRIS, *THE FUTURE OF IMPRISONMENT* 10-11 (1974).

"The guilty we convict; the innocent we divert and supervise." Such is the coercive threat of trial, the pain of detention, the delays, the fears and uncertainties of punishment, that diversionary processes prove compelling for all but the most determinedly innocent or the most experienced in crime.

In the Baltimore pretrial diversion project for adults, Project FOUND, no guilty plea was required. The program, though no longer operational, see note 125 *supra*, apparently was so popular that there was in fact a waiting list of people who had not even been arrested but who nevertheless wished to take part in the project's educational program. Interview with Joseph Baum, Director of Project FOUND, in Baltimore, Jan. 7, 1976.

127. See Comment, *Pretrial Diversion*, *supra* note 123, at 849; Statement of Daniel J. Freed, Professor of Law, Yale Law School, on H.R. 9007 and S. 798 — *Pretrial Diversion* — Before the Subcomm. on Courts, Civil Liberties, and Administration of Justice of the House Comm. on the Judiciary, 93d Cong., 2d Sess., at 3-4 (1974). One study concluded that to date any cost-benefit analysis is likely to be fraught with so many subjective issues of philosophy and morality of pretrial diversion

are placed on pretrial diversion are unlikely to face imprisonment anyway, and thus the state ends up incurring an additional expense by paying for their participation in the program. In addition, there is one fundamental concern: widespread use of diversion, while less onerous than prison, may increase the state's control and supervision over many more people without a determination of guilt.¹²⁸ But whatever faults pretrial diversion may have, its problems can perhaps be minimized by careful analysis of the pilot programs now in operation. Moreover, given the crisis proportions of the current and projected overcrowding problem, reform programs such as pretrial diversion must be undertaken.

Less radical than diversion is a pretrial release program. Under such a project, arrestees are screened and staff members make recommendations as to bail reduction or release on recognizance.¹²⁹ In fashioning remedies for jail overcrowding some courts have ordered that pretrial release programs be established.¹³⁰ In Baltimore the Pretrial Release Services of the Supreme Bench has been active for several years in helping to control the overcrowding at the Baltimore City Jail.¹³¹ Studies made of various pretrial release projects indicate that an increase in the number of people released before trial does not pose an increased danger to the community; that is, there appears to be a low statistical probability that persons released on their own recognizance through a pretrial release project will be re-arrested during their freedom.¹³² Also, through such projects, the incidence of those failing to appear at trial did not increase.¹³³ This would tend to indicate that pretrial detention

as to make it imprecise at best. PRETRIAL INTERVENTION STRATEGIES, *supra* note 123, at 102. See also Nelson, *Cost Benefit Analysis and Alternatives to Incarceration*, 39 FED. PROB. 45 (Dec. 1975).

128. See note 126 *supra*.

129. For an examination of various bail reform projects, see P. WICE, BAIL AND ITS REFORM: A NATIONAL SURVEY (LEAA 1973); VERA INSTITUTE OF JUSTICE, PROGRAMS IN CRIMINAL JUSTICE REFORM (1972); Comment, *Pretrial Release of an Accused in Ohio — A Proposed Revision of Ohio Bail Laws*, 41 U. CINN. L. REV. 423 (1972); Comment, *Pretrial Release Under California Penal Code Section 853.6: An Examination of Citation Release*, 60 CALIF. L. REV. 1339 (1972); Wice & Simon, *Pretrial Release: A Survey of Alternative Practices*, 34 FED. PROB. 60 (Dec. 1970).

130. See notes 108-10 and accompanying text *supra*.

131. In February 1975 the population of the Baltimore City Jail reached 1,875, capacity being approximately 1,200. Mayor Schaefer instituted an emergency ninety-day program to reduce the population, and, among other measures, he stepped up the activities of the Pretrial Release Division. Friedman interview, *supra* note 4.

132. See Gottfredson, *An Empirical Analysis of Pretrial Release Decisions*, 2 J. CRIM. JUST. 287 (1974). In Note, *Preventive Detention: An Empirical Analysis*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 300, 317-23 (1971), it was also found that the incidence of crimes committed while on bail is low.

133. In Wice & Simon, *Pretrial Release: A Survey of Alternative Practices*, 34 FED. PROB. 60, 62-63 (Dec. 1970), a study was reported in which the no-show rate actually dropped, even after a nearly four-fold increase in the percentage of release on recognizance. See also O'Rourke & Salem, *A Comparative Analysis of Pretrial Release Procedures*, 14 CRIME & DELIN. 367 (1968).

and bail are perhaps overused and unnecessary for many people.¹³⁴ If these studies are accurate, then more of society's resources, whether by community initiative,¹³⁵ court order,¹³⁶ or legislation, ought to be focused on the development of these alternatives to incarceration at the pretrial stage to insure fairer treatment of the accused¹³⁷ and to help alleviate the oppressive, potentially unconstitutional treatment of pretrial detainees.¹³⁸ Still the primary cause of overcrowding in Maryland's jails is the back-up from the state's post-conviction correctional facilities, and relief there seems to be the most effective way to ease pressures at the pretrial stage.

Post Trial Alternatives

Penitentiaries developed in the early nineteenth century in this country as a reform measure — an experiment to find more humane ways of dealing with criminal offenders.¹³⁹ The basic idea was to isolate the prisoner from all corrupting influences and establish a disciplined routine

134. A recent survey of the Baltimore City Jail showed that there were 654 "counts" at the jail for which bail had been set at less than \$1,000. Letter from Richard W. Friedman, Director of the Mayor's Coordinating Council on Criminal Justice, to Michael A. Millemann, Jan. 22, 1976 (on file at the *Maryland Law Review*). There are of course many instances in which one inmate has more than one count against him; figures are as yet unavailable as to how many individual detainees are held for under \$1,000 bail. But if there are a substantial number of one-count detainees, this, taken with the fact that the going rate for bailbondsmen is ten percent, means that those people remain in jail simply because they cannot raise one hundred dollars.

135. The effectiveness of Baltimore's pretrial release program could perhaps be augmented by increased participation of community organizations. Under Maryland District Court Rule 777(c)(1)(a) the judicial officer making the bail determination can "place the defendant in the custody of a designated person or organization agreeing to supervise him and assist in assuring his appearance at court . . ." Thus the administration of a pretrial release program in Maryland need not be strictly a governmental function.

136. See notes 108-18 and accompanying text *supra*.

137. See note 30 *supra*.

138. One largely administrative problem is that in the past judges of the Supreme Bench of Baltimore City have taken their six week vacations each year at some point during the summer resulting in a drastic slow-down of the judicial process during these months. This has been somewhat alleviated recently by the coordination of vacation schedules and by arrangements to use visiting judges from nearby counties, but a substantial summer slow-down remains. Friedman interview, *supra* note 4.

In a recent decision, *Epps v. State*, 276 Md. 96, 345 A.2d 62 (1975), the Maryland Court of Appeals ordered that a defendant convicted of robbery with a deadly weapon be released and the indictment dismissed because his trial had been delayed for over a year due to scheduling problems and an overcrowded court docket. This reflects a growing recognition of a defendant's constitutional right to a speedy trial which will perhaps result in greater efforts to reduce the length of a defendant's pretrial detention.

139. See generally G. DEBEAUMONT & A. DETOCQUEVILLE, *ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE* (F. Lieber transl. 1833) [hereinafter cited as DEBEAUMONT & DETOCQUEVILLE]; Rothman, *The Invention of the Penitentiary*, 8 CRIM. L. BULL. 555 (1972).

intended to rehabilitate. Prisons were designed to provide an environment conducive to restoring social values which had been ruined by society's evils. It was felt that separation of the inmates from each other was crucial to the success of this plan.¹⁴⁰

Although conceived with good intentions and high aspirations, the experiment has become a monstrous failure in terms of recidivism, rehabilitation, and human dignity. Prisons are, by and large, rarely beneficial to prisoners.¹⁴¹ Length of sentence has little effect on recidivism,¹⁴² judicial sentencing decisions are often disparate in similar factual situations,¹⁴³ and convicts rarely serve their full sentences anyway.¹⁴⁴ Given the ineffectiveness of present sentencing, the National Council of Crime and Delinquency advocates strict statutory control of sentence length and further suggests that use of prisons should be limited only to those who must, for public safety, be incarcerated.¹⁴⁵ This position is embodied in its Model Sentencing Act which would limit the use of long-term incarceration to those considered dangerous, *i.e.*, assaultive offenders with personality disorders and those deeply involved with organized crime.¹⁴⁶

140. In 1831, Alexis deTocqueville and Gustave deBeaumont came to the United States to study American prisons on behalf of the French government. Writing about the objectives of penitentiaries, they made the following observation:

There are similar punishments and crimes called by the same name, but there are not two beings equal in regard to their morals; and every time that convicts are put together, there exists necessarily a fatal influence of some upon others, because, in the association of the wicked, it is not the less guilty who act upon the more criminal, but the more depraved who influence those who are less so.

We must therefore . . . come to a separation of all.

DEBEAUMONT & DETOCQUEVILLE, *supra* note 139, at 55.

141. See K. MENNINGER, *THE CRIME OF PUNISHMENT* 71-81 (1969).

142. See Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 36-38 (1974) [hereinafter cited as Martinson].

143. See generally JUSTICE IN SENTENCING: PAPERS AND PROCEEDINGS OF THE SENTENCING INSTITUTE FOR THE FIRST AND SECOND UNITED STATES JUDICIAL CIRCUITS (L. Orland & H. Tyler eds. 1974); M. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973); NATIONAL ADVISORY COMM'N ON CRIM. JUSTICE STANDARDS AND GOALS, *CORRECTIONS* 142 (1973) [hereinafter cited as *CORRECTIONS*]; Palmer, *A Model of Criminal Dispositions: An Alternative to Official Discretion in Sentencing*, 62 GEO. L.J. 1 (1973); Kadish, *Legal Norm and Discretion in the Police and Sentencing Process*, 75 HARV. L. REV. 904 (1962).

144. See *CORRECTIONS*, *supra* note 143, at 144 (table indicating the differences between sentence imposed and actual time served by prisoners released for the first time on current sentences).

145. Board of Directors, Nat'l Council on Crime and Delinquency, *The Nondangerous Offender Should Not Be Imprisoned: A Policy Statement*, 19 CRIME & DELIN. 449 (1973). There is also sentiment that prison construction should be halted until alternatives to incarceration are more fully explored. See Board of Trustees, Nat'l Council on Crime and Delinquency, *Institutional Construction: A Policy Statement*, 18 CRIME & DELIN. 331 (1972). A similar policy recommending a halt in jail construction was issued by the National Advisory Commission on Criminal Justice Standards and Goals. See *CORRECTIONS*, *supra* note 143, at 114.

146. COUNCIL OF JUDGES OF THE NAT'L COUNCIL ON CRIME AND DELINQUENCY, *THE MODEL SENTENCING ACT* (2d ed. 1972) [hereinafter cited as MSA]. For analysis

The adoption of such sentencing scheme in Maryland could help ease overcrowding as well as remove some of the unfairness that defendants experience in sentencing decisions, but numerous problems would nevertheless remain. The criteria for determining dangerousness cannot be sharply defined.¹⁴⁷ It is very difficult to predict future behavior, or, as stated by Professor Marvin Wolfgang:

Anyone who asserts that science has the tools to predict violent criminal behavior from the population at large has not adequately considered the problems of computing mathematical probabilities, the imprecision of our diagnostic instruments, the consequences of invasion of privacy if psychiatric and psychological tests were given to the entire population for such purposes. The infrequency of recorded instances of criminally violent behavior combined with our low level of accurately predicting it would produce an enormous number of false positives because of the propensity for overprediction. Civil and other rights of the false positives relative to any intervention by society before a crime occurred could be staggering.¹⁴⁸

Furthermore, for the non-dangerous offender, the Model Sentencing Act would give the judge discretion to impose probation, suspended sentence, fine, restitution, or a term of incarceration not to exceed five years.¹⁴⁹ This discretionary power to incarcerate, although limited to a five-year term, could nevertheless be frequently exercised without consideration being given to alternatives to incarceration.

Other safeguards are necessary to insure a consistent, sensible approach to sentencing. Illinois now has under consideration a proposed sentencing act which encompasses the concept of de-emphasis on incar-

of the Model Sentencing Act see Flood, *The Model Sentencing Act: A Higher Level of Penal Law*, 9 CRIME & DELIN. 370 (1963); Rubin, *The Model Sentencing Act*, 39 N.Y.U.L. REV. 251 (1964). The act provides for a mandatory life sentence for first degree murder (MSA § 7) and a term of not more than thirty years for the dangerous offender (MSA § 5). See also Palmer, *A Model of Criminal Dispositions: An Alternative to Official Discretion in Sentencing*, 62 GEO. L.J. 1 (1973).

Other legislative models have also advocated limiting the use of long term incarceration to dangerous offenders. See ABA ADVISORY COMMITTEE ON SENTENCING AND REVIEW, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES §§ 2.1, 2.5 (Approved Draft, 1968); MODEL PENAL CODE — SENTENCING PROVISIONS § 7.03 (1963); CORRECTIONS, *supra* note 143, at 150-57. See also O'Leary, Gottfredson & Gelman, *Contemporary Sentencing Proposals*, 11 CRIM. L. BULL. 555 (1975).

147. See Ginsberg & Klockars, "The Dangerous Offender" and Legislative Reform, 10 WILLIAMETTE L. REV. 167 (1974).

148. Wolfgang, *Violence and Its Relation to Sentencing*, 46 F.R.D. 533, 551 (1968). See also N. MORRIS, THE FUTURE OF IMPRISONMENT 62-73 (1974); Wenk, Robison & Smith, *Can Violence be Predicted?*, 18 CRIME & DELIN. 393 (1972). But see Kozol, Boucher & Garofalo, *The Diagnosis and Treatment of Dangerousness*, 18 CRIME & DELIN. 371 (1972) (asserting that dangerousness can be reliably diagnosed).

149. MSA, *supra* note 146, at § 9. See also Hickey & Rubin, *Suspended Sentences and Fines*, 3 CRIME & DELIN. LIT. 413 (1971); Note, *Creative Punishment: A Study of Effective Sentencing Alternatives*, 14 WASHBURN L.J. 57 (1975).

ceration and provides that sentences be predictable and reviewable.¹⁵⁰ The act would drastically narrow present judicial discretion in sentencing and provide a routine procedure of sentence review to make sure that there is state-wide uniformity.¹⁵¹ There would also be an upgrading of presentence investigations.¹⁵² Judges would be provided with detailed background information on each offender and suggestions as to which rehabilitation programs might be suitable for him. The anticipated result is that judges, once given this individualized report, will turn to incarceration only as a last resort.

Some of the most frequently mentioned alternatives to incarceration are the imposition of fines,¹⁵³ victim restitution,¹⁵⁴ and various types of community based facilities,¹⁵⁵ such as those recently authorized for construction in Maryland.¹⁵⁶ The imposition of monetary penalties, although suitable in some instances,¹⁵⁷ would have to be applied cautiously. If the offender is too poor to pay the fine (and especially if non-payment results in confinement) little is gained by imposition of the fine.¹⁵⁸ The

150. See ILLINOIS LAW ENFORCEMENT COMMISSION, SYNOPSIS — JUSTICE MODEL LEGISLATION (1975); text accompanying note 171 *infra*.

151. Although Maryland law provides for appellate review of sentencing, the current procedure does not lend itself to statewide uniformity. Instead of having one central reviewing board, sentences in each circuit can be reviewed by a board of three judges of that circuit. See MD. ANN. CODE art. 27, §§ 645JA-JG (1976).

152. Maryland recently enacted a statute making presentence investigations mandatory. See [1976] Laws of Md., ch. 118, § 1, to be codified in art. 41, § 124(c) of the Maryland Code. The statute does not specify what should be in the presentence investigation report nor the weight to be given it by the court. Whether this law will have a substantial impact on sentencing practices in Maryland remains to be seen.

153. See MSA, *supra* note 146, at § 9; ABA ADVISORY COMMITTEE ON SENTENCING AND REVIEW, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 2.7 (Approved Draft, 1968); MODEL PENAL CODE — SENTENCING PROVISIONS § 7.02 (1963); CORRECTIONS, *supra* note 143, at 162. See also Hickey & Rubin, *Suspended Sentences and Fines*, 3 CRIME & DELIN. LIT. 413 (1971); Note, *The Use of the Fine as a Criminal Sanction in New Jersey: Some Suggested Improvements*, 28 RUTGERS L. REV. 1185 (1975); Note, *Creative Punishment: A Study of Effective Sentencing Alternatives*, 14 WASHBURN L.J. 57 (1975).

154. See Galaway & Hudson, *Restitution and Rehabilitation: Some Central Issues*, 18 CRIME & DELIN. 403 (1971). See also Fogel, Galaway & Hudson, *Restitution in Criminal Justice: A Minnesota Experiment*, 8 CRIM. L. BULL. 681 (1972).

155. See Klapmuts, *Community Alternatives to Prison*, 5 CRIME & DELIN. LIT. 305 (1973).

156. [1976] Laws of Md., ch. 234, §§ 1-3, to be codified in art. 27, §§ 706-10E of the Maryland Code. The new law is a revision of earlier community corrections legislation which proved ineffective. The old version permitted localities to veto any proposed community facility construction [Act of May 26, 1972, ch. 464 (repealed 1976)] with the result that few community corrections centers were ever built. The new version removes this veto power.

157. Monetary penalties are perhaps most appropriate when the offender has received a pecuniary gain from his crime and the court feels that a fine would serve as an adequate deterrent. See MODEL PENAL CODE — SENTENCING PROVISIONS § 7.02 (1963).

158. Indeed, there may well be constitutional problems. See *Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235 (1970) (both cases holding it to

community based corrections centers may, however, be a more satisfactory alternative. The goal of the community based facility is to provide the offender with the maximum possible contact with the resources of his community. Ideally, the centers would be relatively small (no more than one hundred) and *not* house anyone who might be considered dangerous to the community.¹⁵⁹ Such facilities would constitute a reasonable alternative between the extremes of lenient probation and harsh sentencing. The convict would have necessary restrictions on his freedom, be provided with a program of counseling and training, and, possibly, hold a job in the community.

These alternatives to incarceration, however, probably will be of little help in relieving prison overcrowding. Fines are not always a satisfactory alternative,¹⁶⁰ and community corrections centers are not intended to absorb excess prison population.¹⁶¹ There was a fear that judges would begin to sentence offenders to community corrections in instances in which they previously would have given probation.¹⁶² This would result in rapid overcrowding of the community facilities. The newly passed legislation attempts to preclude this by requiring, as a precondition of admission to a community corrections center, that the offender's presentence investigation report recommend community corrections and that the offender be accepted by the director of the center.¹⁶³

Attention should also be given to programs which facilitate a convict's early release, provided of course that such release poses no threat to society.¹⁶⁴ The most important change must come in the area of

be a denial of equal protection to incarcerate someone for non-payment of a fine solely by reason of his indigency). *See also* CORRECTIONS, *supra* note 143, at 162-65; Note, *Fining the Indigent*, 71 COLUM. L. REV. 1281 (1971); Note, *The Use of the Fine as a Criminal Sanction in New Jersey: Some Suggested Improvements*, 28 RUTGERS L. REV. 1185 (1975).

159. *See generally* GOVERNOR'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, STATE OF MARYLAND, CRIMINAL JUSTICE REPORT: ANALYSIS OF COMPREHENSIVE PLANS TO DEVELOP A STATEWIDE COMMUNITY CORRECTIONS SYSTEM (1973); WILNER, *supra* note 5.

160. *See* text accompanying notes 157-58 *supra*.

161. Chief Legislative Officer Alan M. Wilner in his report to the Maryland General Assembly stated that community facilities

will in no way permit the State to "clean out" the prisons . . . [W]e are facing a serious crisis of overcrowding in our correctional institutions which the development of community facilities will not, in the short run, even begin to solve.

WILNER, *supra* note 5, at 3.

162. *Id.* at 33.

163. [1976] Laws of Md., ch. 234, § 2, to be codified in the Maryland Code at art. 27, § 710C. The statute also allows an incarcerated inmate to be transferred to a community facility if he had been a resident of the center's county or region at the time of his arrest, plans to return there, his remaining sentence is less than six months, and, if convicted of a crime of violence, he is accepted by the center's director.

164. For discussion of the problems involved with predicting future criminal behavior, *see* text accompanying notes 147-48 *supra*.

parole. Parole developed as a humanitarian response to the hardships of long sentences, but the process as it has developed often frustrates and humiliates prisoners.¹⁶⁵ Because of the existence of parole, judges frequently sentence in excess of what might be termed "fair" because they take into account the possibility of early release.¹⁶⁶ Furthermore the decision to grant or deny parole is supposed to be based on whether the inmate has been sufficiently rehabilitated by his stay in prison.¹⁶⁷ More often, however, eligibility for parole is determined not by degree of rehabilitation, (if such a determination can accurately be made¹⁶⁸) but by the passage of time, *i.e.* serving a specified ration of the sentence.¹⁶⁹

The central feature in most suggestions for parole reform is a removal of discretion.¹⁷⁰ Some approaches have advocated completely abolishing parole and replacing it with fixed, "flat-time" sentences, which can be shortened by the inmate's good behavior ("good time").¹⁷¹ The judge would set the sentence in accordance with legislative guidelines without having to take into account the unpredictable, discretionary decisions of some future parole board. The offender would know his release date and know that he can shorten his stay in prison, not by wooing a parole board, but by good and lawful behavior.¹⁷² The resulting shorter sentences should help reduce prison population.

165. See generally Comment, *Curbing Abuse in the Decision to Grant or Deny Parole*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 419 (1973).

166. CORRECTIONS, *supra* note 143, at 146.

167. See generally CITIZENS' INQUIRY ON PAROLE AND CRIMINAL JUSTICE, INC., PRISON WITHOUT WALLS: REPORT ON NEW YORK PAROLE (1975).

168. See R. GOLDFARB & L. SINGER, AFTER CONVICTION 278-82 (1973).

169. Comment, *Curbing Abuse in the Decision to Grant or Deny Parole*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 419, 423 (1973).

170. For analysis of present parole practices and suggestions for reform, see CITIZENS' INQUIRY ON PAROLE AND CRIMINAL JUSTICE, INC., PRISON WITHOUT WALLS: REPORT ON NEW YORK PAROLE (1975); *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810 (1975); Comment, *Curbing Abuse in the Decision to Grant or Deny Parole*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 419 (1973). See also O'Leary & Nuffield, *A National Survey of Parole Decision-making*, 19 CRIME & DELIN. 378 (1973); Palmer, *A Model of Criminal Dispositions: An Alternative to Official Discretion in Sentencing*, 62 GEO. L.J. 1 (1973).

171. See ILLINOIS LAW ENFORCEMENT COMMISSION, SYNOPSIS — JUSTICE MODEL LEGISLATION (1975).

172. A relatively new concept, adopted by the Maryland Division of Correction and the Parole Board is the so-called MAP (Mutual Agreement Programming). It works on a contract concept: a plan is negotiated with each eligible inmate whereby he is given several objectives (*e.g.*, education, skill training, work assignment, treatment, and behavior). If he lives up to the goals, the state is obliged to release him on the agreed upon date. See MAP COORDINATOR, MARYLAND DIVISION OF CORRECTION, MARYLAND MODEL — MUTUAL AGREEMENT PROGRAMMING (July 1974). The result is to speed up rehabilitation by incentives, reduce discretionary decision making, and shorten sentence length.

CONCLUSION

As noted above, a de-emphasis on the use of incarceration must be accompanied by an increase in the capacity of correctional institutions in order to deal with overcrowding. Construction as now planned in Maryland will, however, only add some 1,300 beds over the next five to six years, while the projected prison population could increase by 5,000.¹⁷³ If plans were changed to meet this population explosion, it is estimated that the extra cost of construction would amount to \$23 million.¹⁷⁴ It is beyond the scope of this comment to analyze the fiscal problems involved in planning such a massive building program. In any event it is unlikely to be undertaken in time to provide any significant remedy to the current crisis.

Maryland has, by necessity, limited the use of post-conviction incarceration so that roughly only one out of every five convicts is imprisoned, yet the rise in the prison population is out of control. Undermining the entire philosophy of corrections are the disturbing conclusions of recent research that there is very little that any rehabilitative program can do to reduce recidivism.¹⁷⁵ The failure of rehabilitative programs suggests that criminal behavior cannot be treated as a disease.¹⁷⁶ Crime can be viewed as a social phenomenon: a necessary result of a complex of social, moral, and legal factors;¹⁷⁷ our failure to understand and to deal with these factors is demonstrated by the overcrowded prisons. By increased use of pretrial diversion and pretrial release, restrictions on judicial discretion in sentencing, use of alternatives to incarceration (or shorter fixed sentences) for the non-dangerous offender, limiting the use of long-term incarceration to dangerous criminals, and re-evaluating parole procedures, we might reduce jail and prison populations and perhaps accomplish as much as any penal system can with a minimum of suffering.

But these suggestions must be considered in light of public opinion. Many citizens are firm in their conviction that the threat of incarceration

173. WILNER, *supra* note 5, at app. 5.

174. DEP'T OF PUB. SAFETY AND CORRECTIONAL SERV., THE POPULATION PROBLEM IN CORRECTIONS AND APPROACHES TO SOLUTION 14 (Aug. 1975).

175. See Martinson, *supra* note 142; Adams, *Some Findings From Correctional Caseload Research*, 31 FED. PROB. 48 (Dec. 1967). See also Bailey, *Correctional Outcome: An Evaluation of 100 Reports*, 57 J. CRIM. L.C. & P.S. 153 (1966).

176. See Martinson, *supra* note 142, at 49-50.

177. Crime reflects more than the character of the pitiful few who commit it. It reflects the character of the entire society. How do people capable of stealing a car or mugging a cripple, of embezzling from the bank that trusted them or raping an eighty-year-old woman, come to be that way? All they are and all they have experienced that drove them to commit that crime overcame all that sought in vain to restrain them. What they are and what they experienced came largely from society — from its influence on them and on their forebears.

R. CLARK, CRIME IN AMERICA 17 (1970).

is absolutely necessary for its deterrent effect.¹⁷⁸ No one can ignore the overwhelming public sentiment, motivated by real fear, that more, not fewer, should be locked up. The pervasive demands for "law and order" and "getting tough" with crime appear to be incompatible with penal reform aimed at restricting the use of incarceration. Nonetheless, some state prison systems are being forced by federal courts to reduce prison populations. State legislatures are caught between these conflicting forces. By taking the initiative to institute widespread reforms in pretrial procedures and sentencing practices, despite public opposition, states can improve prison conditions while preserving autonomy over their own correctional systems.

178. See Connolly, *The Possibility of a Prison Sentence Is a Necessity*, 21 CRIME & DELIN. 356 (1975). But see THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 16 (1967):

Deterrence — both of people in general and offenders as potential recidivists — and, where necessary control remain legitimate correctional functions. Unfortunately there has been little attempt to investigate by research and evaluation of the extent to which various methods of handling offenders succeed in these respects. See also K. MENNINGER, *THE CRIME OF PUNISHMENT* 206 (1969). ("[T]he equivocal justification of deterrence . . . is a weak and vulnerable argument indeed, for the effects of punishment in this direction cannot be demonstrated by sound evidence or research.").